

PUBLIC LAW BOARD NO. 6942

Case No. 33

**United Transportation Union
and
Union Pacific Railroad Company**

Appearances:

Mr. Richard M. Draskovich, Sr. Vice General Chairperson UTU, 5990 SW 28th Street, Suite F, Topeka, Kansas 66614-4181, appearing for the Organization.

Mr. Robert A. Henderson, Assistant Director-Labor Relations, Union Pacific Railroad Company, 1400 Douglas Street, STOP 0710, Omaha, Nebraska 68179, appearing for the Carrier.

ARBITRATION AWARD

The undersigned was assigned as the third or Neutral Member of Public Law Board No. 6942 on May 3, 2006. The undersigned was assigned this case on May 4, 2006.

Based upon the entire record and arguments of the parties, we issue the following Award.

DISCUSSION

By letter dated July 11, 2005, the Carrier notified Norman J. Bomberger ("Claimant") to report for an investigation and hearing in connection with the following charge:

While employed as the East Hump Foreman on the P21R-04 job on July 04, 2005, you allegedly failed to acknowledge hump computer warnings of cars fouling clearance track circuits in group 6 and verifying that cars were fouling the switch lead out of track 146 before humping cars into track 143, which resulted in the collision of the CEFX 91614 with the CEFX 13719, derailing the CEFX 13719.

Following the investigation, the Carrier sustained the charges and found the Claimant in violation of General Code of Operating Rules 1.1.1, and 7.1 effective April 2, 2000, and System Special Instructions, Item 17 effective April 3, 2005 and assessed a **Level 2 Discipline** (five day suspension without pay) and placed him at the **Conference Level** in the Behavior Modification Matrix with a 24-month recovery period.

The Organization asserts that the Carrier failed to prove its allegations against the Claimant. The Organization asks that the discipline assessed the Claimant be reversed.

The Carrier argues that it overwhelmingly proved that the Claimant did not comply with the rules with which he was charged and that there are no mitigating circumstances. The Carrier requests that the grievance be denied.

The record indicates that on July 4, 2005, the Claimant was assigned as East Hump foreman on the P21R-04 at North Platte, Nebraska. This position is responsible for efficient humping operation, in which cars are slowly pushed over a hill and allowed to roll down into the hump yard. By utilizing the computer, the cars are switched to any of a number of tracks at the bottom of the hill, and in this way outbound trains are built.

While on this job, the Claimant failed to acknowledge hump computer warnings of cars fouling and allowed additional cars to be humped toward the full track. However, these cars could not get by without hitting the car that had fouled. The yardmaster, who oversees the hump, noticed the problem developing and called the Claimant to stop the humping, but the warning came too late and the cars were already rolling down the hill to the collision and derailment which subsequently occurred.

Due to this incident, the Claimant violated Rule 1.1.1, "Maintaining a Safe Course," because the Claimant had doubt and/or uncertainty as to what actions to take, "and the safe course wasn't taken." (Tr. p. 21). The Claimant also violated Rule 7.1, "Switching Safely and Efficiently," because his actions allowed cars to foul equipment causing a collision. (Tr. pp. 21, 32). Finally, by his actions, the Claimant violated Item 17, Job Briefing, because he should have had a job plan that he understood and which identified potential hazards and avoided them. (Tr. pp. 21-22).

The Organization argues that there were a number of mitigating circumstances.

First, the Organization concedes that the Claimant "knew we were out to foul in 46," but points out that he thought they had taken "measures to ensure nothing else was going to go there." (Tr. p. 32). However, the Claimant also concedes that the "switch couldn't fail because 46 was out too far to foul and so those cars rolled in on top of 46." In addition, although the Claimant thought they had taken the appropriate measures so no other cars would go there, (Tr. p. 32), "he should have an understanding exactly where all his cars are going. (Emphasis added). (Tr. p. 24). The Claimant admitted that he didn't have such knowledge. (Tr. p. 32). Consequently, we reject this claim of the Organization.

The Organization also points out that the Claimant relayed information from the yardmaster over the intercom to his pinner in order to try to avoid the collision, "but it was too late, those two cars already rolled." *Id.* It is good that the Claimant made an effort to try to avoid the problem. However, he should have taken action right away when the computer scan flashed a warning that there were cars in the circuit fouling the hump lead in order to avoid potential problems. He did not take any action. (Tr. p. 18).

One of the things he could have done was to have a re-job brief with his pinner to avoid any potential hazards. (Tr. p. 25).

The Organization also argues that the Claimant was inexperienced and relying on the yardmaster. In this regard, the Claimant testified that he was forced to do this job and not adequately trained. However, he admits that he was a qualified foreman in North Platte, Bailey Yard. (Tr. p. 34). In addition, he took and passed an exam for the position and went through a training period for it. *Id.* If he had doubts about his course of action, the prudent thing would have been to re-brief with the yardmaster and pinner before he took any action and/or not take any further action until he was sure of the outcome.

Finally, the Organization attempts to shift the blame to the yardmaster by asserting that if he/she "had called the red board on the radio instead of through the speaker intercom system, the Claimant's pinner would have been advised of the situation in time to prevent the collision and derailment." However, it is uncertain that would have been the result. (Tr. p. 20). In addition, while the yardmaster has some overseeing responsibility, it is primarily the Hump Foreman's responsibility to check to make sure cars are not fouling. (Tr. p. 17). Finally, it appears that the yardmaster also may have received discipline as a result of the incident. (Carrier's Submission, p. 2). Consequently, we reject this claim of the Organization.

Based on all of the above, we find that the Carrier has proven by substantial evidence that the Claimant is guilty of the actions complained of.

Based on the foregoing, it is our

AWARD

The grievance is denied, and the matter is dismissed.

Dated at Madison, Wisconsin this 23rd day of May, 2006

Dennis P. McGilligan
By Dennis P. McGilligan, Chairman & Neutral Member

I concur _____ Date 6-6-06 I dissent _____ Date _____
R. Henderson
Robert A. Henderson, for the Carrier

I concur _____ Date 6/6/06 I dissent _____ Date _____
Richard M. Draskovich
Richard M. Draskovich, for the Organization

PUBLIC LAW BOARD NO. 6942

Case No. 34
Award No.

34

PARTIES TO DISPUTE: United Transportation Union

and

Union Pacific Railroad Company

STATEMENT OF CLAIM: Claim of Engineer C. J. McCormick for removal of a 5-day suspension and Level 2 discipline from his personal record with pay for all time lost, including time spent attending the investigation, vacation benefits, and payment for all wage equivalents to which entitled, with all insurance benefits and any monetary loss for such coverage while improperly disciplined, without regard to any outside income that may have been earned by Claimant during such period of time.

FINDINGS: Upon the whole record and all of the evidence, the Board finds as follows: That the Carrier and Employees involved in this dispute are, respectively, Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction over the parties and subject matter involved.

This claim arises from discipline assessed against Claimant following a disciplinary investigation which was held on August 24, 2005. The caption of the charge against Claimant was as follows: "...to develop the facts and determine your responsibility, if any, with the report that, as crew member on the WGJGJR-28 on July 28, 2005 at approximately 1600 hours in the vicinity of MP 373 on the North Fork Subdivision in Delta Colorado, you allegedly failed to line switch for your intended movement then allegedly proceeded to make a reverse move over the damaged switch causing derailment."

The investigation had originally been scheduled for August 10, 2005, but was postponed by mutual agreement upon a request for a two-week postponement made by the Organization.

Based upon evidence developed and testimony given at the investigation, Claimant was notified that he had been found to have violated Rules 8.2 and 7.1 of Carrier's General Operating Rules. For these violations, Claimant was assessed discipline

Level 2 Conference of the Carrier's Behavior Modification Discipline Policy and a five day actual suspension by Carrier's General Superintendent Joseph Whalen.

The Organization has lodged no complaint with regard to the timeliness or sufficiency of the notice of investigation, to the manner in which the investigation was conducted, to the timeliness of the notice of discipline or the handling of the claim on the property. Accordingly, these matters are not now before this Board.

The Organization has lodged no complaint concerning the quantum of discipline assessed, that is, the Organization has not argued that even if the charges were proven, the discipline was too severe or discriminatory or not otherwise in accordance with the Carrier's discipline policy. Accordingly, the only issue before this Board is whether substantial evidence was developed during the August 24, 2005, investigation to support Superintendent Whalen's finding that Claimant was guilty of the charges brought against him at the August 24, 2005 investigation. If substantial evidence was developed against Claimant to support the finding of guilt, then the issue of the appropriateness of the amount of discipline assessed against Claimant is not before this Board.

Claimant testified that he was working as the Engineer on train WGJGJR-28 on July 28, 2005. Claimant's conductor testified that he was lining switches which the train had used to get onto the track that it was on at the time of the derailment and that the other crew member was at the rear of the train. That left Claimant as the only crew member on the locomotive. Claimant further testified that he was instructed to pull the train in an eastward direction off the main line and into a yard identified as the Delta Yard and that, in doing so, it was necessary for him to move his engine and several cars across a crossover switch which led to another yard track. The result of this move, according to the testimony of the Conductor of WGJGJR-28, was that the train was blocking a road crossing. The crew was then instructed to shove the train back (westward) to clear the road crossing then cut off the engine and several cars and move them east also clear of the road crossing on the east side. It was in the process of shoving the train back that the derailment occurred at the crossover switch which Claimant's locomotive and several cars had traversed in the first eastward movement.

Claimant, on the engine, said that he could not actually see the derailment occur. He also testified that he saw that the crossover switch, which he traversed at a speed of 3 miles per hour, was lined in his favor, that is, lined for him to continue to proceed in an easterly direction. He further testified that, in the ten years in which he'd worked in that yard, he had never seen the switch "lined against us coming off the main line there. And it wasn't lined against me then."

Carrier witness Phillips on the other hand, at the conclusion of lengthy testimony, testified as follows:

Q. Mr. Phillips, through your investigation of this incident, is it your testimony that the derailment of the WGJGJR-28 occurred because the crew made an eastward move through a crossover switch which was lined against them?

A. Yes, it is.

Q. And then the subsequent reverse move caused the cars to go on the ground. Is that your testimony?

A. Yes, it is.

Q. Mr. Phillips, would this indicate a violation of Rules 7.1 and 8.2?

A. Yes, it would.

Mr. Phillips was questioned at great length during his testimony by Claimant's representative and by other Organization representatives about other possible causes for the derailment. He was asked whether the weight of the 6-axle locomotive which Claimant was operating could have caused the derailment. He responded by acknowledging that 6-axle locomotives were not supposed to be operated on those tracks but stated that operation of these locomotives on those tracks sometimes became necessary and that the possible result of such operation was a turned over rail derailment, not a derailment which was clearly attributable to a run-through switch.

Mr. Phillips testified with the perspective of an individual having 33 years of experience of which more than 20 was as roadmaster or assistant roadmaster or track supervisor. He was able to point to several indications which supported his conclusion that the derailment occurred after Claimant's locomotive had run through a switch which had been lined against him, i.e., the position of the switch handle; damage done to the operating rod; the position of the switch targets, which indicate the position of the switch points; and the position of the switch points themselves, all of which indicated that the switch had been lined for a move through the crossover, that is, lined against Claimant's easterly move. He was also able to testify at length concerning marks made on the switches and the positions of the derailed cars and to describe why those marks and car positions showed that the derailment occurred because Claimant shoved back over a switch that had been run through. Finally, Mr. Phillips testified to what the switch would have looked like to Claimant had it been lined in his favor, i.e., a gap between the movable points and the stock rail of nearly 5 inches vis-à-vis no gap if the switch had not been previously run through or a gap of one inch (the width of a wheel flange) between movable point and stock rail if the switch had been run through.

Mr. Phillips' testimony was thorough and credible. He answered willingly and completely any questions which Claimant's representative propounded.

Claimant's response to this testimony (and the Organization's position throughout the handling of this claim on the property) was to say that he couldn't have been responsible for running through the switch or the derailment because he saw that the switch was lined for his movement; accordingly some other factor must have caused the derailment and damaged switch.

The Board concludes that Mr. Phillips' detailed testimony provides ample and substantial support for the conclusion that Claimant ran through a switch and that running through the switch then resulted in a derailment when Claimant shoved back across the damaged switch.

The final question to be addressed by this Board is whether or not Claimant's failure to observe that the crossover switch over which he operated was lined against his movement constituted a violation of Carrier's General Operating Rules 7.1 and 8.2.

Rule 7.1 provides, in pertinent part, that:

"While switching, employees must work safely and efficiently and avoid damage to contents of cars, equipment, structures, or other property."

While there were questions raised during the hearing about whether or not the crew of train WGJGJR-28 was "switching" when the derailment occurred, the crew was certainly operating over switches and making moves which involved the operation of switches. Although the Rule that was most clearly shown to have been violated in this case was Rule 8.2 (see below), this Board believes that the word "switching" in the context of the rule as a whole and in this situation should be interpreted broadly so as to insure that any employees who work with switches are put on notice that they are expected to work safely and finds that Carrier could conclude that Rule 7.1 was violated.

Rule 8.2 requires, inter alia, that:

"When possible, crew members on the engine must see that the switches and derails near the engine are properly lined."

As the only member of the crew on the locomotive at the time of the movement which directly preceded the derailment, Claimant bore the brunt of compliance with this rule. This Board finds that the investigation developed substantial evidence that Claimant did not comply with Rule 8.2.

The Board, admittedly, is hard pressed to reconcile that which Claimant testified that he observed, a switch lined for his movement, and the physical evidence, that Claimant had run through a switch which was lined against him, to which Carrier's witness Phillips testified in so much detail. Perhaps the source of the discrepancy between the testimonies of these two witnesses, both of whom testified with

conviction and candor, can be found in Claimant's testimony that in the many years in which he had operated in this yard, he had never found this switch lined against him. It has long been known that human beings on occasion see what they expect to see rather than what is actually present.

In any event, having found that there was substantial evidence supporting Carrier's conclusion that Claimant was guilty of violating Rules 8.2 and 7.1, which violations resulted in a switch being run through and a derailment, the Board also concludes that the discipline assessed was warranted.

AWARD: The claim is denied

David J. Rutkowski, Neutral Member

Robert A. Henderson, Carrier Member

Richard M Draskovich, Employee Member